IN THE COURT OF APPEALS OF IOWA

No. 3-932 / 12-1871
Filed December 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYRONE DARNELL JONES,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Tyrone Jones appeals his judgment and sentence for robbery in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Chandra Peterson, Student Legal Intern, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Tyrone Jones appeals his judgment and sentence for robbery in the second degree, in violation of Iowa Code sections 711.1 and 711.3 (2011). We affirm.

I. Background Facts and Proceedings

The State filed a trial information charging Tyrone Jones with robbery in the first degree for his alleged involvement in a March 2012 robbery of a Kum & Go convenience store in Des Moines. The jury could have found the following from the evidence presented at trial.

On the night of March 25, 2012, Troy Rivas was at home in Ankeny and "couldn't sleep." He took some extra prescription "anxiety and anti-psychotic medication," but then "got a little crazy." At approximately 2:30 a.m., he drove to a Kum & Go near his house and "pulled out a knife and demanded money." The clerk behind the counter ran out of the store. Rivas drove back home without taking any money.

When he got back, he woke his girlfriend, Blair Wheatcraft, and told her "what happened." She did not believe him. Rivas "told her [he] just wanted to forget about it" and laid down. Then he got back up and called Tyrone Jones "to let him know what [he] did." Jones did not answer, but returned Rivas's call "like ten minutes later."

Rivas told Jones about the "robbery that [he] attempted." Jones told Rivas, "Well, I've got one we could rob in Des Moines." Rivas agreed to pick Jones up at "Sixth and Indiana," the location he would "usually" meet Jones. Rivas knew Jones "[f]rom the streets" as "St. Louis." In the six months preceding

the incident, Rivas had been in contact with Jones "[j]ust about every day" to "buy drugs from him."

At approximately 3:00 or 3:30 a.m., Rivas and Wheatcraft[1] drove to Des Moines. Rivas brought a "large cutting knife" from his house. When they got to Sixth and Indiana, Jones was "waiting on the street." Rivas moved to the passenger seat and Jones got in the driver's seat because "he [knew] the neighborhood real well." Wheatcraft sat in the backseat.

Jones "said he's got a place for [Rivas] to go which was Git-n-Go on 42nd Street." When they realized the Git-n-Go on 42nd Street was closed, Jones "said there's a place down here on 31st."

Jones pulled up to a Kum & Go on 31st Street. Rivas "jump[ed] out" and went into the store. He pretended he was going to purchase a couple soda pops, "[t]hen displayed the knife, demanded the money." The clerk opened the cash register, Rivas grabbed money out of it, [t]hen [he] took off running." Meanwhile, Jones had backed the car into a spot on the side of the store. Rivas got into the passenger seat and Jones "sped off."[2] Rivas counted the money; "[i]t was $160."

They drove straight to "[s]omewhere on 21st Street" "[t]o get crack." Jones purchased some drugs then they parked somewhere to "get high." They purchased and consumed more drugs, then Rivas dropped Jones off on Sixth Avenue, and he and Wheatcraft headed back to Ankeny. They were immediately arrested when they arrived at home, at around 6:00 a.m.

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[1] Wheatcraft sometimes accompanied Rivas to meet Jones to buy and consume drugs.

[2] The timing and placement of Rivas's car at Kum & Go, as well as Rivas exiting and entering through the passenger door of his car, was depicted on a Kum & Go surveillance video.

Investigator Lorna Garcia interviewed Rivas. Rivas "came clean that he committed the robbery." He told Garcia "there was a driver named St. Louis," but "refused to give [St. Louis's] real identity." Garcia also interviewed Wheatcraft. Wheatcraft gave a consistent account of the incident. Wheatcraft also told Garcia "some information on Mr. Jones as well," including that she "knew him by St. Louis."

Garcia interviewed Jones several days later. Jones confirmed he knew Rivas "through their drug connection." Jones stated he had been in contact with Rivas on the night in question.[3] Jones's account of the incident aligned with that of Rivas and Wheatcraft up until when Rivas was supposed to pick Jones up at Sixth and Indiana. Jones told Garcia that Rivas "never showed up." Jones elected not to testify at trial.

Following trial, the jury found Jones guilty of the lesser-included charge of robbery in the second degree. The district court entered judgment and sentenced Jones to a term of imprisonment not to exceed ten years, with a mandatory minimum of seventy percent, and suspended the $1000 fine. Jones now appeals.

II. Scope of Review

Jones contends his trial counsel was ineffective in failing to object to evidence tending to show Jones was a drug dealer. We review this claim de novo. *See State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013). To prevail, Jones must show that (1) counsel breached an essential duty and (2) prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[3] Phone records confirmed several calls placed between Jones and Rivas that night.

If we can determine from the existing record that it will be impossible for Jones to establish either prong of the *Strickland* test, we will affirm his conviction without preserving the claim. *See State v*. *Taylor*, 689 N.W.2d 116, 134 (Iowa 2004). But if it is necessary to more fully develop a factual record, we will preserve the claim for a possible postconviction relief action. *See id.* We find the record in this case is sufficient to allow us to address it on direct appeal.

III*. *Discussion

Jones contends his trial counsel was ineffective in failing to object to evidence "tending to show [he] was a drug dealer" as prior bad acts under Iowa Rule of Evidence 5.404(b)[4] and as more prejudicial than probative under Iowa Rule of Evidence 5.403.[5]

Specifically, Jones takes issue with evidence introduced by the State that Rivas knew him "from the streets" by the nickname "St. Louis"; that Rivas was in contact with him "just about every day" in the six months prior to the night of the robberies to "buy drugs from him;" that Rivas bought drugs from Jones; and that Rivas would have Jones buy drugs for him. This evidence was introduced at trial in both direct and cross-examination through Rivas's testimony, confirmed by

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[4] That rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa R. Evid. 5.404(b).

[5] That rule provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Iowa R. Evid. 5.403.

Wheatcraft's testimony, and addressed by the testimony of the investigating officer. Trial counsel's closing statement also referenced Jones' drug dealing.[6]

Jones claims "[t]here was no need for this evidence because the State had other evidence as to Jones's alleged role in planning the robbery as well as assisting in the execution of the crime, as the driver of the getaway car." Jones contends "[t]he evidence tending to show [he] was a crack dealer was not relevant to the crime and was more prejudicial and probative."

In analyzing Jones's claim, we keep in mind the precept that counsel has no duty to raise an issue that lacks merit. *Taylor*, 689 N.W.2d at 134. In this case, we do not believe that admission of the evidence tending to show Jones was a drug dealer violated rules 5.404(b) and 5.403. Accordingly, counsel had no duty to object under those rules.

Under rule 5.404(b), prior bad acts are admissible if (1) they are relevant to a legitimate issue in the case and (2) there is clear proof that the individual against whom the evidence is offered committed the prior act. *State v*. *Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004). The relevancy prong requires the prosecutor to articulate "a valid, noncharacter theory of admissibility." *Id.* at 28. The purpose of the clear-proof prong is to prevent jurors from speculating or drawing inferences on mere suspicion that the defendant was responsible for the prior acts. *See State v*. *Alderman*, 578 N.W.2d 255, 258 (Iowa Ct. App. 1998). But

[6] It is clear defense counsel's strategy was to discredit the testimony of Rivas and Wheatcraft by portraying Jones as the disaligned third party. To strengthen that theory, defense counsel attempted to disconnect Jones from the other two and play up his role as their dealer, but not friend. If so, given the other evidence submitted to the jury, counsel had an objectively reasonable strategy going into trial.

the commission of the prior acts need not be established beyond a reasonable doubt, and corroboration of the other acts is not required. *Id.*

Moreover, "[n]ot all evidence of other crimes, wrongs, or acts falls within the scope of rule 5.404(b). One category of other crimes, wrongs, or acts evidence not covered by rule 5.404(b) is evidence deemed inextricably intertwined with the crimes charged." *State v. Nelson*, 791 N.W.2d 414, 419 (Iowa 2010). "Inextricably intertwined evidence is evidence of the surrounding circumstances of the crime in a causal, temporal, or spatial sense, incidentally revealing additional, but uncharged, criminal activity." *Id.* at 420. Such evidence is admissible only when "the other crimes, wrongs, or acts evidence is so closely related in time and place and so intimately connected to the crimes charged that it forms a continuous transaction." *Id.* at 423. Also, the evidence is admissible only "when a court cannot sever this evidence from the narrative of the charged crime without leaving the narrative unintelligible, incomprehensible, confusing, or misleading." *Id.*

Here, there is strong circumstantial evidence that Jones had a history of drug dealing and that he sold drugs to Rivas. Rivas testified he met Jones through another drug dealer "on the street to make a purchase," and that he bought drugs from Jones nearly every day in the six months preceding the robbery. Wheatcraft testified she knew Jones only as "St. Louis," from whom Rivas purchased drugs. She stated Jones sometimes consumed drugs with them, but usually just sold the drugs to Rivas. Rivas and Wheatcraft both testified they purchased and consumed drugs with Jones twice on the night of

the robbery. Wheatcraft identified Jones as St. Louis from a photo line-up immediately following the robbery.

The investigating officer encountered an unrelated case with the name "Tyrone Jones a/k/a St. Louis" several days after the robbery. It was the first time the officer "had known about this person with this alias, so [she] looked into that." She realized "[h]e kind of fit the general description of the suspect in this case" and he had the same phone number as the one Jones had provided to her, which was also the same as one of the phone numbers Wheatcraft had provided for him. According to the officer, Jones himself acknowledged he knew Rivas "through their drug connection." Indeed, Jones told the officer on the night of the incident Rivas "had called him, [Rivas] wanted to get some crack cocaine, so they agreed to meet."[7] The jurors were free to disbelieve Jones's claim that he was waiting for Rivas, but Rivas never picked him up.

Moreover, we conclude that these circumstances fall into that narrow category of cases in which the other crimes evidence is "inextricably intertwined" with the charged offense. *See id.* at 424. The uncharged drug-related crimes and the charged crime of robbery were so closely related in time and place that they formed one continuous transaction. *See id.* at 423. Indeed, telling the story of how Jones came to be involved in the planning of the robbery and the driver of the get-away car for the robbery at 4:30 a.m. would have been disjointed and confusing without the narrative of the Rivas and Jones's drug-related relationship and the motive of getting money to buy drugs. *See id.* We conclude the danger

[7] Jones acknowledged he had phone calls with Rivas on the night of the robbery. That night, cell phone records depicted telephone calls placed from Rivas to Jones at 2:47 a.m. and from Jones to Rivas at 3:09 a.m., 3:42 a.m., and 3:55 a.m.

of unfair prejudice did not outweigh the probative value of the drug-related evidence in this case.

Trial counsel had no duty to challenge the challenged evidence under rules 5.404(b) and 5.403 because such an objection would have been without merit. Because Jones has not satisfied the first prong of the *Strickland* test, his claim for ineffective assistance of counsel must fail. *See State v. Shanahan*, 712 N.W.2d 121, 138 (Iowa 2006) (reiterating that the failure to prove either prong of the *Strickland* test is fatal to an ineffective-assistance-of-counsel claim). We find no basis to reverse Jones's conviction.

AFFIRMED.